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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

VIRGIL AYERS, W. C. MEADERS, JR.,
BOYCE BLACKMON and JOE ACKER,
Petitioners,

v.

SPARTAN GRAIN & MILL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, under the decisions of this Court in *United States Steel v. Fortner Enterprises*, 429 U.S. 610 (1977) and *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, —— U.S. ——, 104 S.Ct. 1551 (1984), economic power in a non-patented tying product may only be shown by proof that the seller had a cost advantage in offering the tying product, or whether economic power may also be shown by uncontroverted proof that:

(a) the seller had and repeatedly exercised the unilateral ability to raise prices;

(b) the seller imposed burdensome terms on an appreciable number of buyers;

(c) the seller substantially discriminated in price between buyers; and

(d) the seller forced buyers to purchase a tied product which buyers would have preferred to purchase elsewhere on different terms.

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The Petitioners, Virgil Ayers, W. C. Meaders, Jr., Boyce Blackmon and Joe Acker, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on July 5, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals which is reported at 735 F.2d 1284 (11th Cir. 1984) is reprinted in the Appendix at page 1a. A prior opinion of the Court of Appeals which is reported at 581 F.2d 419 (5th Cir. 1978) is reprinted thereafter. No written opinion was rendered by the District Court for the Middle District of Georgia.

JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Circuit was entered on July 5, 1984. A timely petition for rehearing was denied on August 9, 1984. The petition for certiorari was filed within the time allowed by statute. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 1 of the Sherman Act. 15 U.S.C. § 1.

STATUTE INVOLVED

Section 1 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

STATEMENT OF THE CASE

In December, 1972, three of the petitioners ("producers") filed antitrust counterclaims against Spartan Grain & Mill Company ("Spartan") charging it with tying in violation of Section 1 of the Sherman Act. In August, 1973, a fourth producer filed a separate complaint based on the same allegations. The relevant facts established by the producers' evidence are largely undisputed and include the following:

Poultry purchased in a supermarket begins with a hatching egg which is transmitted to a hatchery where it becomes a chick. The chick is then grown out to the broiler stage, slaughtered and processed. Virtually all firms engaged in poultry production are vertically integrated: each firm owns all factors of production including a hatchery, a feed mill and a processing plant. Spartan is a non-integrated feed mill; the producers reside in Northeast Georgia and were owners of houses for the production of hatching eggs.

During the relevant period, hatching eggs were principally produced pursuant to a "contract" arrangement. An integrated company owned the flock and supplied the feed; the producer was paid 10 cents to 12 cents per dozen for the use of his houses and his labor. The producer was, in effect, an employee compensated on a piecework basis.

From 1960 through 1971, Spartan offered to place hatching egg flocks pursuant to a more attractive "independent" arrangement. The producer owned the flock, paid for the feed and sold his eggs for 69 cents per dozen. The producer was more his own businessman and his profit potential was greater—$2.00 or more per bird as compared with $1.00 per bird under a contract arrangement.

From 1968 through 1972, the poultry industry endured a prolonged slump. Numerous concerns which had previously placed hatching egg flocks with producers in Northeast Georgia terminated such operations. Other concerns pulled out of the area, concentrating their flock placements within 30 miles of their plants in Athens and Gainesville. The fact, therefore, that Spartan had available an arrangement of any type was additionally attractive.

There was, however, one drawback to the Spartan arrangement—it was a "package deal." Spartan would first obtain a commitment from a hatchery to purchase eggs for the life of a given flock [1] and Spartan would then order the flock covered by the commitment, but Spartan would make this "package" available to the producers *only* on the condition that they "feed Spartan Feed." Because the cost of feed is the largest item of expense in the production of hatching eggs, each of the producers initially questioned this requirement and was

[1] The hatcheries were principally located in Pennsylvania and Ohio and, for numerous reasons, were not accessible to individual producers.

assured that the price of Spartan Feed would be "competitive"; when such assurances proved to be unfounded, each producer complained about Spartan's prices and requested permission to purchase feed from other sources. Spartan insisted, however, on compliance with the condition and made no alternatives available to the petitioners.

Not only were Spartan's prices initially noncompetitive, but the gap consistently widened. For example, Spartan's cash price at the end of 1969 for feed delivered to Northeast Georgia producers was $80.75 per ton as compared with a competitive price of $66.00, a difference of approximately $15.00 per ton. At the end of 1970, Spartan's price was $93.94 as compared with a competitive price of $74.90, a difference of approximately $20.00 per ton. At the end of 1971, Spartan's price was $91.34, as compared to a competitive price of $65.90, a difference of approximately $25.00 per ton. Accordingly, even after affording Spartan a credit of four cents per dozen, or approximately $6.00 per ton, for its services in providing the flock placement,[2] the producers were overcharged from the outset and Spartan's feed prices became increasingly more onerous.

In addition, Spartan imposed harsher terms on Northeast Georgia producers than it did on producers in the Gainesville area where it faced a modicum of competition. For example, Spartan paid the latter 67 cents per dozen for eggs and, throughout the relevant period, extracted a $9.00 per ton margin from the sale of feed. In Northeast Georgia, Spartan paid 69 cents per dozen, but extracted a margin per ton for feed that grew from $18.00 to $30.00.[3] Using the stipulated conversion for-

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[2] The credit was based on Spartan's dealings with producers in other areas and on internal memoranda wherein Spartan identified a reasonable return for its services. The cents per dozen was converted to dollars per ton pursuant to a stipulated formula.

[3] Spartan's average margin and the industry norm was $8.00 per ton.

mula, Spartan thus discriminated against Northeast Georgia producers in the range of $6.00 to $18.00 per ton over a four-year timeframe.

Faced, however, with the alternative of empty houses, each of the producers entered into a series of agreements with Spartan. Indeed, notwithstanding its feed prices, Spartan had "waiting lists" of producers for its program. From 1960 through 1971, Spartan was able to extract more than 600 agreements obligating producers to "feed Spartan Feed." From 1968 through 1971 alone, Spartan extracted more than 235 agreements, covering more than 2,000,000 birds and pursuant to which Spartan sold more than $5,500,000 in feed.

Spartan's only significant non-integrated competitor was unable to obtain a sufficient volume of hatchery commitments to offer an independent program. Spartan's integrated competitors were fearful that independent producers might insist on buying feed elsewhere, thereby reducing the overall efficiencies of the integrated process. Moreover, during economic downturns, Spartan with the overhead of only one factor of production enjoyed a cost advantage over integrated firms with the overhead of multiple factors of production. Until 1972, therefore, when Spartan too was unable to obtain a sufficient volume of hatchery commitments, Spartan offered its independent program in Northeast Georgia without direct competitive restraint.

The producers' antitrust claims were consoliated for trial in August, 1975 and resulted in judgments for the producers, before trebling, of approximately $50,000. In October, 1978, the Fifth Circuit reversed. *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978), *cert. denied*, 444 U.S. 831 (1979). Based on the Supreme Court's interim decision in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) (*"Fortner II"*), the Fifth Circuit held that the "parties had built [their] record on a faulty conception of the requirements

for proving a per se violation" and remanded "for a new determination" as to Spartan's economic power. 581 F.2d at 428-29.

In October, 1981, the producers' antitrust claims were retried and, pursuant to the "larger inquiry into Spartan's market position" mandated by the Fifth Circuit, 581 F.2d at 429 n.10, the producers offered extensive evidence, summarized above, as to Spartan's ability to engage in price discrimination and above-market pricing and to impose burdensome terms on buyers. At the conclusion of the evidence, the jury responded that Spartan's arrangements afforded it "an economic advantage . . . over its competitors" and judgments were again entered for the producers.

In July, 1984, the Eleventh Circuit reversed, holding that only proof of a "cost advantage" would suffice to establish Spartan's economic power. *Spartan Grain & Mill Co. v. Ayers*, 735 F.2d 1284, 1288 (11th Cir. 1984). Deeming the holding to be inconsistent with *Fortner II* and with this Court's interim decision in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, —— U.S. ——, 104 S.Ct. 1551 (1984), issued after oral argument below, the producers file this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

In Holding That Economic Power Cannot Be Shown By Proof Of A Seller's Ability To Raise Prices, To Impose Burdensome Terms On Buyers, To Discriminate Between Buyers And To Force Buyers To Purchase Unwanted Products, But Can Only Be Shown By Proof That A Seller Has A Cost Advantage In Producing The Tying Product, The Decision Below Is In Conflict With The Decisions Of This Court And With Basic Economic Theory.

The Eleventh Circuit delineated the issue before it quite succinctly:

> We are asked today to decide what factors constitute proof of economic power. Spartan contends there is only one factor, cost advantage. The pro-

> ducers argue that cost advantage is only one of several factors. These other factors [include] price discrimination [and] burdensome pricing . . . .

735 F.2d at 1287-88. The Eleventh Circuit agreed with Spartan. The producers assert that the holding is contrary to economic theory and Supreme Court authority.

It is true, of course, that a party predicating economic power *solely* on the theory of uniqueness must prove one of three types of advantages:

> "legal, as in the case of patented and copyrighted products, . . . physical, as when the product is land, . . . [or] economic, as when competitors are simply unable to produce the distinctive product profitably . . . ."

735 F.2d at 1288 (quoting *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 505 n.2 (1969) (*"Fortner I"*)). The producers met the uniqueness test by establishing, as the Eleventh Circuit acknowledged, that Spartan's program "was not economically attractive" to its integrated competitors. 735 F.2d at 1287. Principally, however, the producers predicated economic power on theories *other than* uniqueness.

In *Fortner II*, for example, this Court quoted with approval the holding of *Fortner I* that " 'the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms . . . , with respect to any appreciable number of buyers within the market. . . .' " 429 U.S. at 620 n.13 (quoting 394 U.S. at 504). Indeed, it is economic dogma that market power is "the power to control prices . . . ." *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). As stated in Landis and Posner, *Market Power in Antitrust Cases*, 44 Harv. L. Rev. 937 (1981):

> The term "market power" refers to the ability of a firm . . . to raise price above the competitive level

> without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded.

As similarly stated in P. Areeda and D. Turner, *Antitrust Law* (1978), at ¶ 501:

> [M]arket power in economic terms is the ability to raise price without a total loss of sales. It is, thus, clearly a matter of degree. The degree of market power may be extremely small, as when any more than a slight increase in price would lead to an unacceptable loss of sales. It is substantial where a firm can raise price substantially without a significant profit decline resulting from competitors' increased output or lower prices or from consumer resistance at the higher price.

As even observed by the Eleventh Circuit, "[m]arket power is the ability to raise price significantly above the competitive level without losing all of one's business." *Graphic Products Distributors v. Itek Corp.*, 717 F.2d 1560, 1570 (11th Cir. 1983).

That Spartan had the unilateral power to control the price of its feed without fear of reaction from producers or competitors cannot be seriously questioned. Spartan's own industry witnesses were, indeed, in awe of the margins Spartan extracted. The producers' economic expert referred to Spartan's pricing practices as "astonishing." As Spartan's own economic expert testified:

> Q. And in a competitive world, . . . you face a risk when you charge a price substantially above the competitive level . . .?
>
> A. In a competitive world, you can't do that.

Restricting the producers exclusively to proof of a cost advantage was thus error.

Indeed, the discussion in *Fortner II* of uniqueness and of a cost advantage transpired only *after* the Court determined that plaintiff there had *failed* to show defendant's ability to control prices or impose burdensome

terms. Specifically, Fortner simply contended that he had been required to pay U.S. Steel more for prefabricated houses than he would have allegedly paid its competitors in order to obtain very favorable credit terms from U.S. Steel which included financing not only of the houses, but of the lots on which they were to be placed. The flaw in plaintiff's reasoning was that he made no effort, as admonished to do by the Supreme Court in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968), to assess the "beneficial by-products of [U.S. Steel's restraint] . . . ." Stated differently, he afforded no offset for the value of U.S. Steel's favorable credit terms and, as a consequence, the jury's award of $93,200 equalled almost exactly the number of houses purchased times the alleged overcharge.

The reason for plaintiff's failure to follow the admonition of *Perma Life* was obvious—the value of the credit *exceeded* the alleged overcharge. Plaintiff's own evidence, for example, was to the effect that other prefabricated home manufacturers charged a 10% discount fee, as compared to U.S. Steel's fee of ½%, a difference on plaintiff's $2,000,000 loan of $190,000, or more than $900 per home.

In *Fortner II*, therefore, the Supreme Court held that U.S. Steel's entry into 42 agreements with others for the purchase of its homes at $443 above the price allegedly charged by competitors, was not evidence of economic power, Justice Stevens observing that:

> Proof that Fortner paid a higher price for the tied product is consistent with the possibility that the financing was unusually inexpensive and that *the price for the entire package was equal to, or below, a competitive price.* And this possibility is equally strong even though a number of Home Division customers made a package purchase of homes and financing.

429 U.S. at 618 (emphasis supplied). Stated differently, a plausible explanation for the 42 agreements in *Fortner*

II was that U.S. Steel's *net price* for homes was no more, and in fact was less, than the net prices of its competitors so that it was to the plaintiff's *economic advantage* (or at least not to his economic detriment) to deal with U.S. Steel.

Here, by contrast, the producers heeded the admonition of *Perma Life* and did not rest after merely showing the magnitude of an arguably superficial overcharge. Only as a *first step* did the producers show that in receiving 69 cents per dozen for eggs and being required to "feed Spartan Feed," they paid Spartan approximately $114,000 more for feed than they would have paid to a competitor. The producers then established, as noted above, that in adjacent markets, Spartan and others were paying 65 cents per dozen for eggs without a feed tie-in. From this and other evidence, including Spartan's internal memoranda, the value of the hatching egg program alone was determined to be approximately 4 cents per dozen—the difference paid for eggs depending on whether or not a tie-in was extracted. Even, however, after the producers deducted this "beneficial by-product" (which amounted to more than $46,000) and provided additional offsets for other Spartan services, the net competitive disadvantage of being required to "feed Spartan Feed" exceeded $50,000.

Whereas, therefore, U.S. Steel could argue that its 42 agreements were not evidence of its economic power because those agreements were not shown to be economically detrimental to buyers, the producers here clearly established that Spartan's 600 agreements were economically detrimental to those required to purchase Spartan's feed. The producers are thus entitled to benefit from the holding in *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1216 (9th Cir. 1977), where the Court stated that even in the wake of *Fortner II*, "[o]ther possible indices of sufficient economic power include . . . a noncompetitive higher price" imposed on "substantial numbers of

buyers . . . ." Similarly, the producers are entitled to benefit from the holding in *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55, 69 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (emphasis supplied), where the Court even more directly stated that "[a]cquiescence in the *burdensome* term by an appreciable number of customers gives rise to an inference that [the defendant had] 'some power over some buyers' in the market."

Finally, apart from Spartan's unilateral and repeated ability to raise prices and to impose burdensome terms on producers, this Court additionally observed in *Fortner II* that the use of a tie in "to facilitate price discrimination . . . would imply the existence of power that a free market would not tolerate." 429 U.S. at 617. Again, it is standard textbook economics that "[f]or a seller to practice price discrimination profitably," it "must have some control over price—some [market] power." F. Scherer, *Industrial Market Structure and Economic Performance* (2d ed. 1980), at 315. As Professor Sullivan has stated, "[i]f price discrimination persists in a market over a long period, the inference can be drawn that the firm practicing it possesses substantial market power." L. Sullivan, *Handbook of the Law of Antitrust* (1977), at 89. As is stated in P. Areeda and D. Turner, *Antitrust Law* (1978), at ¶ 514a:

> Price discrimination in sales of the same product cannot last long in a competitive market. When many sellers of the same product are earning more on one type of transaction than on another, each will attempt to divert sales to the high-profit category, and that diversion will continue until the differential returns have been eliminated. Thus, persistent price discrimination in the sale of the same products to different customers clearly indicates that *the customers are in separate markets and that there is a lack of effective competition in the market where the higher net returns are made. In other words, it shows that the seller has market power.* [Footnotes omitted; emphasis supplied.]

In this action, if Spartan had paid the petitioners 67 cents per dozen as it did Gainesville producers, and had permitted them to haul their feed from Gainesville, Meaders would have saved $14,000; Ayers $10,500; Blackmon $13,000; and Acker $5,500. If Spartan had sold feed to the petitioners at $9.00 above its direct costs, as it did to Gainesville producers, Meaders would have saved $20,000; Ayers $19,000; Blackmon $19,000; and Acker $9,500. While, therefore, the producers' complaints of discrimination went to no avail, it is apparent that Spartan utilized its arrangements to enhance "monopoly profits over what they would [have been] absent the tie." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, —— U.S. ——, 104 S.Ct. 1551, 1559 (1984).

The Eleventh Circuit was simply incorrect, therefore, in holding that above-market pricing, the ability to impose burdensome terms on buyers and price discrimination were "relevant only to the extent that they were probative of cost advantage." 735 F.2d at 1288. To the contrary, they are directly probative of the "ultimate fact" of economic power. They *cannot occur* in the absence of economic power.

Even if it were unclear from *Fortner II* that uniqueness and cost advantage are not the sole determinants of economic power, that proposition is overwhelmingly established by the Supreme Court's decision in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, —— U.S. ——, 104 S.Ct. 1551 (1984). In reversing the Fifth Circuit's determination that the plaintiff in that action had demonstrated market power in the defendants sufficient to condemn as *per se* illegal a packaging of anesthesiological and operating room services, Justice Stevens held that the Fifth Circuit had analyzed the wrong market. Patients, not doctors, were the more proper subjects of concern; buyers, not competitors, are the direct targets of a tying arrangement. Given the *buyer* market before the Court in this action, Justice Stevens' review of tying

principles mandates affirmance of the jury's liability verdict.

Indeed, the main thrust of Justice Stevens' opinion in *Jefferson Parish* is that the *forcing* of *buyers* to purchase unwanted products through a tying device is *per se* unlawful.

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.
>
> > "Basic to the faith that a free economy promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take. . . . By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market. . . ." [Citation omitted.]
>
> Accordingly, we have condemned tying arrangements when the seller has some special ability—usually called "market power"—to force a purchaser to do something that he would not do in a competitive market. [Citations omitted.] *When "forcing" occurs, our cases have found the tying arrangement to be unlawful.*

104 S.Ct. at 1558-59 (footnotes omitted; emphasis supplied).[4] The ability to impose burdensome terms on buyers is thus direct proof of economic power.

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[4] Not once did Justice Stevens, who also authored the majority opinion in *Fortner II*, even refer to, much less suggest the necessity for, proof of "a cost advantage."

In an antitrust context, of course, "forcing" does not carry the connotation of irresistible duress which the term may impart in other contexts. For example, the defendants asserted in *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976) that because one of the plaintiffs had a three month option to withdraw, "he was not forced to accept the franchise or to submit to any detrimental terms." The Fifth Circuit responded:

> This begs the question. Payne did not *have* to take a franchise at all. But if he did he had to shoulder the burdensome terms that the jury found to have been exerted from the inception of his dealings. . . .

536 F.2d at 46 (emphasis in the original). With respect to the *in pari delicto* defense, the Supreme Court remarked even more broadly in *Perma Life Mufflers, Inc.*, 392 U.S. 134, 139, 141 (1968) that:

> Although petitioners may be subject to some criticism for having taken any part in respondents' allegedly illegal scheme and for eagerly seeking more franchises and more profits, their participation was not voluntary in any meaningful sense. They sought the franchises enthusiastically but they did not actively seek each and every clause of the agreement. Rather, many of the clauses were quite clearly detrimental to their interests, and they alleged that they had continually objected to them. Petitioners apparently accepted many of these restraints solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity. . . .
>
> * * * *
>
> . . . In addition, the depositions refer to numerous instances in which petitioners asked Midas for permission to purchase from some other source of supply. The record shows that those requests were repeatedly refused by Midas representatives. . . . A Midas official warned petitioner Pierce, who had been buying some exhaust parts from other manu-

> facturers, "Joe, this is just like cheating on your wife; it is grounds for divorce."
>
> These statements completely refute respondents' argument that petitioners were active participants and show, to the contrary, that the illegal scheme was thrust upon them by Midas.

In *Jefferson Parish*, therefore, Justice Stevens equated "forcing" and market power with "leverage" which he defined as " 'a supplier's ability to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of that second product.' " 104 S.Ct. at 1559 n. 20 (quoting, P. Areeda and D. Turner, *Antitrust Law* (1980), at ¶ 1134a). *Accord, Foremost Pro Color v. Eastman Kodak Co.*, 703 F.2d 534, 541-42 (9th Cir. 1983), *cert denied*, —— U.S. ——, 104 S.Ct. 1315 (1984) ("Coercion for purposes of the *per se* rule means 'a product sold on the condition that the buyer also purchase a different or tied product or at least that the buyer agrees not to purchase the product from any other supplier' "). As conceded even by Justice Harlan dissenting in *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 16-17 (1958) (emphasis supplied):

> *economic coercion* by a vendor may be inferred . . . from the mere existence of the tying arrangements . . . where the vendee is apt to suffer *economic detriment* from the tying clause because precluded from purchasing a tied product at better terms or of a better quality elsewhere.[5]

The evidence of such "forcing" and "economic detriment" in this case was overwhelming and unrefuted.

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[5] Justice Harlan dissented not because he considered a "host of tying arrangements" insufficient to prove economic power, but because the agreements contained escape clauses in the event another carrier offered "lower rates or superior services" so that "the inclusion of the tying clauses . . . might have been largely a matter of indifference to . . . many of the purchasers. . . ." 356 U.S. at 17.

Even after giving credit for each "beneficial by-product" of Spartan's hatching egg program, the producers suffered an economic detriment from the package requirement of more than $50,000. Spartan thus clearly possessed the ability to impose burdensome terms on buyers. It clearly possessed the "capacity to force some buyers to purchase a tied product they [did] not want or would have preferred to purchase elsewhere." *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1340-41 (9th Cir. 1984). Spartan clearly possessed market power.

As Justice Stevens thus concluded "[p]er se condemnation—condemnation without inquiry into actual market conditions—is . . . appropriate if the existence of forcing is probable." 104 S.Ct. at 1560. That is so because absent market power, a seller cannot force an onerous tie-in on buyers:

> (a) either buyers will refuse to accept the burdensome term; or
>
> (b) other sellers will offer better terms and compete away the threatened impairment.

Forcing here is more than probable; it was proven. The jury's liability verdict should thus be reinstated.

CONCLUSION

Proof of a cost advantage is proof of economic power. Because, however, the degree of economic power cannot exceed the magnitude of the cost advantage, it might be quite small. It might also be subject to other market constraints, such as a high cross elasticity of demand, so as to be virtually nonexistent.

Proof, on the other hand, that a defendant has freely and easily engaged in market activity which can be practiced only by a firm with *substantial* economic power is not subject to such qualification. As Justice Stevens observed, therefore, proof that a seller has power " 'to

induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of that second product' " is *direct* and *unequivocal* proof of economic power.

From 1960 through 1971, Spartan extracted approximately 600 agreements pursuant to which producers were contractually obligated to "feed Spartan Feed." Spartan thus clearly had the market power or leverage to force onerous terms on buyers. Plaintiffs respectfully request, therefore, that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 83-8003

SPARTAN GRAIN & MILL COMPANY,
Plaintiff-Appellant,
Cross-Appellee,

v.

VIRGIL AYERS, W.C. MEADERS, JR., BOYCE BLACKMON, and JOE ACKER,
Defendants-Appellees,
Cross-Appellants.

July 5, 1984

Appeals from the United States District Court
for the Middle District of Georgia

Before GODBOLD, Chief Judge, RONEY and KRAVITCH, Circuit Judges.

RONEY, Circuit Judge:

This antitrust suit involves several participants in the broiler chicken industry. Virgil Ayers, W.C. Meaders, Jr., Boyce Blackmon, and Joe Acker produce eggs from which the broiler chickens were hatched. Spartan Grain & Mill Company, supplies feed to chicken farmers. The broiler chicken producers claim that Spartan violated the antitrust laws by tying the sale of its feed to its guaran-

tee of a market for the producers' eggs. Two trials have resulted in verdicts for the producers. The central question on this appeal is whether Spartan had suffered economic power that its marketing program must be viewed as an antitrust violation. On the basis of jury answers to special interrogatories, the district ruled that Spartan had such power. We hold that the jury verdict does not support this finding and reverse the judgment.

Our earlier decision in this case gives a detailed history and explanation of the broiler chicken industry. *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 420-22 (5th Cir. 1978), *cert. denied*, 444 U.S. 831, 100 S.Ct. 59, 62 L.Ed.2d 39 (1979). Briefly restated, the raising of a broiler chicken involves five distinct steps: (1) *primary breeders* hatch breeding flock chicks; (2) *producers* raise the breeding flocks and then collect the eggs; (3) *hatcheries* receive the eggs to hatch the chicks; (4) *growers* raise the chicks to the age that they can be sold as broilers; and (5) *processors* slaughter the broiler chickens and prepare them for market. Another participant in this process is the *feed merchant* who supplies the grain for feeding the chickens during each of the first four steps. The parties to this suit are a *feed merchant*, Spartan, and *producers* of broiler eggs, Ayers, Meaders, Blackmon, and Acker.

As the industry originally evolved, separate individuals handled each step of the production process. A number of inefficiencies resulted from this arrangement. First, there was a duplication of management and accounting personnel. Second, the lack of coordination between the various stages in the industry combined with the natural time constraints of the product created a great risk that there would not be a buyer for every seller, or vice versa, along the production chain. This often resulted either in a waste of product or in capital facilities sitting idle. Third, collective problems occurred because money had to change hands between each stage.

To reduce these inefficiencies, the industry began to integrate the various steps in the production process. In north Georgia, the locale of the present controversy, well over 90% of the industry was integrated by the end of the 1960s. The evidence at trial showed two types of integrated firms. In one type all stages in the production process as well as a feed mill are owned and operated by a single entity. Other integrated firms are comprised only of a feed mill, hatchery, and processing plant. The tasks of producing broiler eggs and growing broilers are "contracted out".

A producer under a contract arrangement with an intergrated firm faces substantially less risk than when functioning as an independent. The integrated firm supplies the breeding flock and provides all medical care and feed required during the life of the bird. Title to the chickens remains in the integrated firm, and it takes the eggs at an agreed upon price. Under an independent arrangement, however, a producer purchases his own flock and administers his own medical care. The independent also shoulders the major cost in producing broiler eggs, feeding the breeding flock. At the time of this dispute, contract producers usually earned between $1.00 and $1.50 per breeding bird for the 30-40 week period in which the birds lay eggs. Independents had the possibility of earning $3.00 or more per breeding bird.

The antitrust claimants in this action are producers of broiler eggs. At the time this suit was filed, they resided in Franklin, Hart, and Elbert counties, which are located in northeastern Georgia. Their personal history mirrows that of the industry in general. The two who have been in the business the longest started out as independents but switched over to contract arrangements in the early 1960s. A third, who is a more recent entrant to the business, began as a contract producer in 1966. The reason the producers joined the integrated firms as

contract producers was because they could find no hatcheries willing to guarantee them a market for the broiler eggs they produced. No producer would take on a breeding flock without a prior agreement from a hatchery because the risk of a catastrophic loss due to lack of an appropriate egg market was too great.

In 1967 and 1968, the poultry industry in the producers' area entered into a prolonged slump. Suddenly, contract arrangements were not available. This was the situation when Spartan, an independent feed merchant, offered the program which is the subject of the present litigation. Basically, Spartan offered producers breeding flocks and, most importantly, a guaranteed market for their eggs in return for the producers' promise to feed Spartan grain. Spartan assured producers its grain prices would be competitive. Spartan's program was popular with producers for two reasons: first, it gave them a chance to stay in business; and second, it was structured so that they could operate as independents instead of as contract producers.

Spartan was bucking industry trends by attempting to create by contract what other firms had accomplished by integration. Several large hatcheries in Pennsylvania, Ohio, and Maryland were recruited by Spartan as outlets for broiler eggs. In return for Spartan's promise to provide a fixed supply of eggs, the hatcheries promised to give Spartan a fixed price for the eggs. Spartan, in turn, wrote approximately the same price into the producers' contracts. Thus, Spartan served as essentially a costless middleman for the producers and hatcheries. Spartan instituted this arrangement to stem the erosion of its share of the feed market to the integrated firms.

By 1972, Spartan closed down this program. It claims that lack of profitability and difficulty in securing hatchery commitments caused the program's demise. In November, 1972, Spartan filed suit against producers, Ayers, Blackmon, and Meaders for the unpaid balances on their

feed accounts. The producers counterclaimed asserting a violation of the antitrust laws. These claims were severed for a later trial. The fourth producer, Acker, filed an independent antitrust suit against Spartan. The two antitrust suits were consolidated for trial. At trial, the producers won a directed verdict on liability and only the issue of damages was sent to the jury.

Spartan appealed to the former Fifth Circuit. That Court defined the antitrust issue as whether Spartan's program constituted a *per se* illegal tying arrangement under section one of the Sherman Act, 15 U.S.C.A. § 1. *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 425, 428 (5th Cir. 1978), *cert. denied*, 444 U.S. 831, 100 S.Ct. 59, 62 L.Ed.2d 39 (1979) (*Spartan I*). In the typical tying arrangement, a seller conditions the sale of one product (the tying product) on the purchase of another product (the tied product). *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). Although the present situation is not typical in that Spartan tied a requirement to buy feed to its promise to purchase eggs, the court held that this arrangement was sufficiently analogous to a tie-in that it should be analyzed under tying doctrine. *Spartan I*, 581 F.2d at 425. That ruling is not in dispute. The central issue under tying doctrine analysis is the extent of Spartan's economic power. Controlling on this point is the Supreme Court decision in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977) (*Fortner II*), which was decided subsequent to the first trial. The *Spartan I* court held that the producers had not established economic power as a matter of law so that a directed verdict of liability was improper. The case was remanded for a second trial, however, to give the producers an opportunity to meet factually the *Fortner II* standards.

At the second trial, both sides relied on expert and industry witnesses to support their positions on economic

power. All of the witnesses agreed that in the long run the integrated firms were the most efficient system for producing broiler chickens. The producers' expert asserted, however, that in the short run, an independent feed mill like Spartan, would have a structural advantage over the integrated firms when the broiler industry as a whole was losing money. This advantage was derived from the relative lack of overhead an independent possessed as compared to an integrated firm. Evidence was produced that the broiler industry was in an economic slump during the period Spartan instituted its tying arrangement. The producers also brought out through testimony and stipulations evidence which showed that Spartan charged substantially above the market rate for its feed and that Spartan discriminated in its pricing policy between diffierent producers.

Spartan's expert testified that any of the integrated firms in north Georgia could have offered a program similar to Spartan's and made a reasonable profit at it. Spartan produced numerous representatives from integrated firms in north Georgia who testified that not only could they have set up a program like Spartan's but they could have done it cheaper. They added that they had not followed that course because it was not economically attractive.

The trial court sent two special interrogatories to the jury on the issue of economic power. The court instructed the jury that an affirmative answer to either question represented a finding that Spartan possessed "appreciable power." The interrogatories read:

> (A) As to the (1) purchase and (2) sale or usage of hatching eggs [was] Spartan Grain & Mill Company's overall arrangement with eastern hatcheries to buy all hatching eggs at the same price Spartan Grain & Mill Company was paying producers, an economic advantage that Spartan Grain & Mill Company had over its competitors?

> (B) Was Spartan Grain & Mill Company in the Royston area able to offer a guaranteed price for hatching eggs during the life of the flock at a time when its competitors under conditions then existing could not have offered an equivalent guaranteed price if they had elected to do so?

Amplifying the second interrogatory, the court instructed the jury that the word "could" referred "to reality, to actuality, as compared to a theoretical possibility."

The jury answered "yes" to the first interrogatory and "no" to the second. Based on this finding of fact, the court entered judgment for the producers. Spartan appeals contesting the relevance of the first interrogatory to the issue of economic power and asserting that the jury's answer to the second interrogatory conclusively resolves the issue of economic power in its favor. We are asked today to decide what factors constitute proof of economic power. Spartan contends there is only one factor, cost advantage. The producers argue that cost advantage is only one of several factors. These other factors are price discrimination, burdensome pricing, and production of an unmatchable differentiated product.

Tying arrangements are *per se* violations of section one of the Sherman Act if "a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. . . ." *Northern Pacific*, 356 U.S. at 6, 78 S.Ct. at 518; *see Jefferson Parish Hospital District No. 2 v. Hyde*, —— U.S. ——, 104 S.Ct. 1551, 1558-1561, 80 L.Ed.2d 2 (1984). The Supreme Court in *Fortner II* discussed the issue of economic power at length. The Court defined the inquiry into economic power in a tying case as "whether the seller has some advantage not shared by his competitors in the market for the tying product." *Fortner II*, 429 U.S. at 620, 97 S.Ct. at 867. Three types of advantages were noted by the Court:

"legal, as in the case of patented and copyrighted products, . . . physical, as when the product is land, . . . [or] economic, as when competitors are simply unable to produce the distinctive product profitably. . . ." *Id.* at 621, 97 S.Ct. at 868 (quoting *Fortner Enterprises, Inc. v. United States Steel*, 394 U.S. 495, 505 n. 2, 89 S.Ct. 1252, 1259 n. 2, 22 L.Ed.2d 495 (1969)) (cites omitted). The Court explained that economic advantage "is not the product itself but rather the seller's cost advantage in producing it." *Id.* Without a showing of cost advantage, according to the Court, there could be no finding of economic power under a theory of economic advantage. *Id.* 429 U.S. at 622, 97 S.Ct. at 868.

Fortner II involved an asserted economic advantage, as does the instant case. The tie-in there was between homes and credit. U.S. Steel had tied credit arrangements to the sale of prefabricated houses. In evaluating the proof on the question of economic power, the Court's entire focus was on whether plaintiff, a disgruntled housing developer, had shown that the tying arrangement was predicated on a cost advantage U.S. Steel had in the tying product market. All of plaintiff's proof was rejected as not probative of cost advantage. The Court thought the most plaintiff had shown was that U.S. Steel had offered a highly competitive package deal.

The amalgam of factors asserted by the producers to be just as relevant as cost advantage to the question of economic advantage were mentioned by the Court in *Fortner II*. But it is clear that the Court thought them relevant only to the extent that they were probative of cost advantage. The producers have confused the evidentiary facts with the ultimate fact.

In the instant case, Spartan tied the purchase of grain to a guaranteed market for eggs. *Fortner II* dictates that the issue on which Spartan's antitrust liability turns is whether Spartan had a cost advantage in the tying product market. Since Spartan's tying product was a

guaranteed market for eggs, the key factual inquiry should have been directed at Spartan's economic ability *vis-a-vis* its competitors to provide a market for eggs.

When the special interrogatories are examined in light of this analysis, the first must be rejected as irrelevant to the question of economic advantage. The first interrogatory asked whether Spartan's arrangement with the eastern hatcheries to purchase broiler eggs was an economic advantage. In phrasing the interrogatory in that manner, the district court focused attention on the economic advantage of the tying product instead of on Spartan's economic advantage in securing the tying product. The Supreme Court cautioned against exactly this misstep in *Fortner II*: economic power when measured strictly by economic advantage is "somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it." *Fortner II*, 429 U.S. at 621, 97 S.Ct. at 868. The district court's entry of judgment on the basis of the answer to the first interrogatory was error.

The question remains whether a third trial is appropriate. The answer in favor of Spartan on the second interrogatory is conclusive on the issue of economic power. Judgment should be entered for Spartan. The second interrogatory asked whether Spartan was able to supply a guaranteed market for eggs at a price its competitors could not meet. The court instructed the jury that the word "could" must be viewed realistically. The second interrogatory read in light of this instruction is more than adequate on the issue of cost advantage. It actually is weighted strongly in the producers' favor. What the interrogatory required in order for the jury to find no cost advantage was that Spartan's competitors be able to make a reasonable profit using Spartan's program when in fact, Spartan should have been only required to show that its competitors would have made no less of a return or lost no more than Spartan. That the

jury answered this interrogatory in Spartan's favor resolves the question of Spartan's economic power.

Since judgment should have been entered for Spartan, the producers' attorney's fees award must be reversed. 15 U.S.C.A. § 15; *See De Filippo v. Ford Motor Co.*, 516 F.2d 1313, 1321 (3d Cir. 1975), *cert. denied*, 423 U.S. 912, 96 S.Ct. 216, 46 L.Ed.2d 141 (1975).

REVERSED and RENDERED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 76-2845

SPARTAN GRAIN & MILL COMPANY,
Plaintiff-Appellant,
Cross-Appellee,

v.

VIRGIL AYERS, *et al.*,
Defendants-Appellees,
Cross-Appellants.

JOE ACKER,
Plaintiff-Appellee,
Cross-Appellant,

v.

SPARTAN GRAIN & MILL COMPANY,
Defendant-Appellant,
Cross-Appellee.

Oct. 3, 1978

Appeals from the United States District Court
for the Middle District of Georgia

Before WISDOM, TJOFLAT and VANCE, Circuit Judges.

WISDOM, Circuit Judge:

Chicken feed transactions in North-eastern Georgia produced this important antitrust litigation involving integrated poultry operations. Spartan Grain & Milling Company [Spartan], a seller of chicken feed, sued chicken

producers (Virgil Ayers, W. C. Meaders, Jr., Boyce Blackmon, and Joe Acker) for the unpaid balances of their feed bills. The producers counterclaimed, maintaining that Spartan had violated several provisions of the antitrust acts. Joe Acker, the fourth producer, filed his own antitrust suit against Spartan. The district court directed a verdict for the producers on their antitrust claims. We reverse and remand.

I.

We must begin with an explanation on the broiler chicken industry.[1] The industry was born about fifty years ago. Fresh chicken had been a seasonable by-product of egg production. Less productive hens and young cockerels were culled from laying flocks in the late spring and early summer. These "June fryers" were tougher, dryer, and gamier than the broilers we eat today. In 1934 the average American ate eight ounces of chicken.

During the 1930's, enterprising egg producers realized that a market existed for chicken year-round. Broilers were raised independently of egg-laying flocks. Production of broilers quadrupled from 1934 to 1940, then doubled from 1940 to 1945. After World War II the expansion continued, largely as a result of capital investment by feed manufacturers and chicken processors. By 1954 Americans were eating an average of 13½ pounds of broiler chicken a year. Supermarket distribution provided one boost; later, fast-food operations provided an-

[1] This discussion of the structure and development of the industry is based largely on three opinions and one law review article. *See Bayside Enterprises, Inc. v. N.L.R.B.*, 1977, 429 U.S. 298, 97 S.Ct. 576, 50 L.Ed.2d 494; *National Broiler Marketing Ass'n v. United States*, 1978, —— U.S. ——, 98 S.Ct. 2122, 56 L.Ed.2d 728, *aff'g* 5 Cir. 1977, 550 F.2d 1380; and *Spartan Grain & Mill Co. v. Ayers*, 5 Cir. 1975, 517 F.2d 214. The article, Brown, *United States v. National Broiler Marketing Association: Will the Chicken Lickin' Stand?*, 56 N.C. L. Rev. 29, 37-46, is particularly helpful.

other. By 1975 the Department of Agriculture reported per capita consumption of chicken in this country as 40.9 pounds. The World Almanac 143 (1978).

The bird in question is a young chicken, between seven and ten weeks old. Broilers, also known as fryers, may be male or female. The market distinguishes between broilers and other poultry. Production of broilers involves several distinct steps.

The process begins with the primary breeder. This step produces chickens which are used as breeders, not as broilers. The chicks are shipped to "producers", such as those in this case, typically when they are one day old. Most of the birds shipped to the producers are pullets, although a few cockerels are included. After a week, the producers debeak the chicks. Soon, vaccinations begin. The birds are vaccinated for several fowl diseases, and tested for others. By the time they are twenty-four weeks old, they are ready to begin laying eggs. A good flock is productive for 38 to 40 weeks from the time they begin laying.

The third step takes the eggs to the hatchery. There, they become broiler chicks. These chicks then move to the fourth step, delivery to the growers. Each of the first four steps involves the feed merchants, providing grain for the flocks. In the fifth step the processor slaughters and dresses the broiler to prepare it for market. The customers for whom the broiler is prepared are often large supermarket chains or fast-food chains.

In the first years of the industry, each of the steps was taken by different people. Title to the product changed hands with each stage of the production process. After World War II the industry increasingly moved toward intergrating the production process. The greater financial resources of the feed merchants and the processors enabled them to finance the expansion of the industry. The integrators expanded their control of the birds at

each stage. Today, 99 percent of the broilers are raised either by "contract growers" or by the integrated firms themselves. Contract growers take the newly hatched broilers and raise them for a fixed price a dozen. Chicken feed and veterinary needs are provided by the integrated firm. Title to the birds rests with the integrated firm. And control over the production decisions rest with the integrated firm. Other stages in the process have also lost much of their independence.

The parties in this case were out of step with their industry. Spartan was a feed merchant, operating for the most part on a non-integrated basis. The producers owned hen houses and had been in the poultry business for up to twenty years. The producers had raised laying flocks both on a contract basis and on an independent basis. They preferred the independent contractor status: they made their own decisions, paid for the services they wanted and had opportunities for greater return. Flock placements for that arrangement had not been available in their area since 1962. They would take flocks on a contract basis. They could not buy and raise flocks completely on their own. The risk that the hatching eggs could not be marketed would be too great. So, under either the independent or the contract system, the producers would produce only when they had someone committed to buy their hatching eggs.

In 1967 and 1968 the bottom fell out of the broiler industry in northeastern Georgia. Several firms had actively placed flocks on a contract basis in that area. Some terminated their operations entirely; others pulled out of the producers' area, Franklin, Hart, and Elbert Counties. There were no flocks available with guaranteed markets for their eggs on either an independent or a contract basis. Then, Spartan stepped into the scene.

Integration of the industry caused problems for Spartan. As other feed merchants increased their control over producers and growers, Spartan's markets were

disappearing. Its solution to integration was to arrange its own contractual integration. Spartan negotiated with the broiler hatcheries in Pennsylvania and Ohio for commitments to take hatching eggs. It also arranged for primary breeders to produce flocks of laying chicks. Finally, it offered these flocks, with guaranteed markets for their eggs, to the producers in northeastern Georgia. Title to the laying chicks was to pass from the primary breeder to the producer. Spartan would then buy the eggs from the producers and sell them to the hatcheries. The producers received independent contractor status. They paid for their chicks' feed and veterinary attention; they decided whether they wanted more flocks and when. Spartan paid several cents a dozen above the long term market price for eggs, and nine cents a dozen above the spot market price in Georgia.[2]

There was only one catch. Spartan pursued this contractual integration to keep its feed market. It required producers in its program to purchase only its feed. Its feed cost $15 to $20 more per ton than comparable feed.[3]

The producers could join Spartan or stop producing broiler eggs. They joined. Meaders signed four contracts covering the period from October 1968 to July 1972. Ayers signed four contracts covering the period from May 1969 to August 1971. Blackmon signed five agreements for the period from November 1968 to May 1972. Acker had been dealing with Spartan since 1965. During the time relevant to this suit, he signed three contracts covering the period from May 1969 to January 1972.

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[2] There was a dispute as to the actual differential. The parties stipulated to a nine cent difference, but the producers' objections at trial seem to have been that the nine cent difference existed only on spot sales, and not on other long run contracts. The resolution of this dispute is not important in this appeal.

[3] Again, this difference was also the subject of controversy at trial. Spartan admitted that its price was higher, but pointed out that it performed services that some of the other feed companies did not perform. On the other hand, the producers urged that the difference was even greater, because Spartan's feed was inferior.

Spartan phased out this program in 1971 and 1972. In November 1972 it filed suit in federal court against Ayers, Blackmon, and Meaders for the unpaid balances of their feed accounts. Federal jurisdiction stemmed from diversity of citizenship. In December 1972 these producers answered and asserted antitrust counterclaims. In August 1973 the district court struck the antitrust contentions as defenses to the contract action, and severed the antitrust counterclaims for later trial. That month Acker filed suit against Spartan on antitrust grounds. His suit was consolidated with the counterclaims of the other producers.

The contract portion of the case, with the non-antitrust counterclaims, was tried in May 1974. The district court directed a verdict for Spartan on the accounts claim and on four counterclaims. The court let one counterclaim go to the jury, which found for the producers. On the accounts, Meaders owed about $9,000, Blackmon about $22,000, and Ayers about $24,000.

All parties appealed. Spartan argued that the judge should have directed a verdict for it on the counterclaim that went to the jury; the producers argued that the trial judge erred in directing verdicts against them on their other counterclaims. The producers did not appeal the directed verdict on the accounts. This Court upheld the directed verdicts on two counterclaims, reversed the directed verdicts on two others, and found sufficient evidence to support the jury's verdict on the counterclaim the producers had won below. *Spartan Grain & Mill Co. v. Ayers*, 5 Cir. 1975, 517 F.2d 214. The remanded issues were settled without another trial.

The producers' antitrust claims were tried in August 1975. They asserted that Spartan's dealings illegally tied the sale of feed to the sale of chicks and cockerels and to the purchase of eggs. These actions, they argued, were tie-in arrangements which violated section one of the Sherman Act, 15 U.S.C. § 1, and section three of the

Clayton Act, 15 U.S.C. § 14. They also urged that these were reciprocal dealings prohibited by section one of the Sherman Act.

By September 1974 both sides had filed motions for summary judgment. The trial judge did not rule on the motions. Four days before trial he refused to grant summary judgment on the ground that such treatment was not appropriate in antitrust cases.

At the close of the producers' evidence, Spartan moved for a directed verdict. The trial court denied Spartan's motion, and expressed its conclusion that the producers had demonstrated a per se violation of the law. The Court ruled that, whether viewed as reciprocal dealing or as a traditional tie-in, the transaction was a tying arrangement that constituted a per se violation under *Northern Pacific Railway Co. v. United States*, 1957, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545. The trial court then refused to accept the evidence on liability Spartan had proffered. According to Spartan's counsel, that evidence dealt with the reasonableness of Spartan's program and the alternatives open to the producers. The rest of the trial therefore was solely on the question of damages. The judge announced to the jury that he had decided, as a matter of law, that a violation had occurred.

After a trial on the issue of damages the jury returned verdicts for the producers, before trebling, ranging from $7,000 to $15,000. Final judgment was entered nine months later, after the trial court considered attorneys fees, a Truth in Lending Act question, and the amount of interest due on the earlier contract judgment.

All parties appealed. Spartan urges that the district court's decision on the liability question was in error both procedurally and substantively and that the jury's verdict on damages was inadequately supported. The producers take exception to two of the trial court's evidentiary rulings concerning damages. They also appeal

from the award of attorneys fees, the date of the court's award of interest on the contract judgment, and the court's ruling that the Truth in Lending Act claim was time-barred.

II.

The trial court's conclusion that a per se violation of the antitrust laws occurred is the central issue of this appeal. Although the parties had argued before trial about the proper characterization of their dealings, the district judge did not consider the distinction crucial. Under either characterization, he felt that *Northern Pacific* required a decision for the producers on liability. We agree that the characterization is relatively unimportant; we disagree, however, with the lower court's conclusion on liability.

Tying arrangements have been defined as "agreement[s] by a party to sell one product only on the condition that the buyer also purchases a different (or tied) product . . . ." *Northern Pacific*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545. Tying arrangements have repeatedly been held to be per se violations of both section one of the Sherman Act and section three of the Clayton Act. *E.g., International Business Machines Corp. v. United States*, 1936, 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085; *International Salt Co. v. United States*, 1947, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed.2d 20; *Northern Pacific Railway Co. v. United States*, 1958, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545; *United States v. Lowe's Inc.*, 1962, 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed.2d 11; *Fortner Enterprises, Inc. v. United States Steel Corp.*, 1969, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (*Fortner I*).

Per se illegality, however, has never meant that all tying arrangements are in fact illegal. Instead,

> "[t]hey are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain

> free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."

Northern Pacific, 356 U.S. at 6, 78 S.Ct. at 518. Recent cases in the area have focused on whether "sufficient economic power with respect to the tying product" exists. *United States Steel Corp. v. Fortner Enterprises, Inc.*, 1977, 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (*Fortner II*). Although the early tying cases were brought by the government, suits by private purchasers have become well-established.

In contrast to tying arrangements, reciprocal dealings have not been the subject of extensive case law development. A reciprocal dealing arrangement exists when two parties face each other as both buyer and seller. One party offers to buy the other party's goods, but only if the second party buys other goods from the first party. For example, if one party is both a food wholesaler and a provider of goods used in processing foods, food processors may be faced by a reciprocal requirement. The first party might agree to buy the processors' products only if the processors buy the processing goods from it. *See Federal Trade Commission v. Consolidated Foods Corp.*, 1965, 380 U.S. 592, 85 S.Ct. 1220, 14 L.Ed.2d 95.

Although there was an earlier line of reciprocity cases in the Federal Trade Commission during the 1930's,[4] the *Consolidated Foods* case was the first recent case in this area. That was an action brought by the F.T.C. under section seven of the Clayton Act to set aside a merger. The Supreme Court held that reciprocity could violate the Clayton Act.

> "We hold at the outset that the 'reciprocity' made possible by such an acquisition is one of the conger-

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[4] *See California Packing Corp.*, 1937, 25 F.T.C. 379; *Mechanical Manufacturing Co.*, 1932, 16 F.T.C. 67; *Waugh Equipment Co.*, 1931, 15 F.T.C. 232.

> ies of anticompetitive practices at which the antitrust laws are aimed. The practice results in 'an irrelevant and alien factor,' 62 FTC ——, intruding into the choice among competing products . . . ."

Consolidated Foods, 380 U.S. at 594, 85 S.Ct. at 1221. The Court found that substantial evidence supported the Commission's finding that the merger violated the Clayton Act, but its conclusion does not have clear implications for non-merger cases. The Court did not state whether these arrangements are per se violations; nor did it consider them in the context of private suits.

The United States pressed for applications of a per se standard to any agreements, express or implied, to sell only on reciprocal terms. *See United States v. General Dynamics Corp.*, 1966 S.D.N.Y., 258 F. Supp. 36; L. Sullivan, Antitrust 492-95 (1977). In *General Dynamics* the government sued again to set aside a merger. The district court agreed, apparently finding reciprocal dealings per se violations of the antitrust laws. 258 F.Supp. at 59.

Our research has turned up one reciprocity suit brought as a private action by a party to the arrangement. *Columbia Nitrogen Corp. v. Royster Co.*, 4 Cir. 1971, 451 F.2d 3. Royster sued Columbia for breach of contract; Columbia responded in part with an antitrust counterclaim based on reciprocal dealings. The trial judge distinguished between coercive and non-coercive reciprocity, resurrecting a distinction made by the F.T.C. in the 1930's. See L. Sullivan, Antitrust 493 (1977). The trial judge allowed Columbia to introduce evidence that Royster had economic power as a buyer of nitrogen from Columbia. Royster denied having this power. This issue of coercive reciprocity was submitted to the jury on a per se basis: the jury had to find only coercion and substantial impact on interstate commerce. The jury found for the defendant. 451 F.2d at 13. On appeal Columbia maintained that it should have been able to go to the jury

on the issue of "non-coercive" reciprocity. The Court of Appeals assumed that non-coercive reciprocity could violate the Sherman Act, but held that, as a matter of law:

> "[W]hen parties of substantially equal economic strength mutually participate in the formulation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other."

451 F.2d at 15-16 [footnote omitted]. It found that the Columbia-Royster relationship fitted that description and affirmed.

The transactions at issue in this case could be characterized either as tie-ins or as reciprocal dealing. The attorneys for each side have argued persuasively each position. On the one hand Spartan was buying eggs and selling feed. The parties agreed that the guaranteed market for eggs was crucial to the producers. On the other hand Spartan did arrange for the producers to buy flocks. In some case Spartan itself sold the chickens to the producers; in others, the legal title was transferred from the primary breeders but all the arrangements, including credit arrangements, were made by Spartan. Spartan demanded that the producers take its feed in order to participate in a package that included Spartan as both buyer and seller.

Fortunately, we need not shape this arrangement to fit either label. The two labels refer to similar phenomena. In each case one side of a transaction has special power in the market place. It uses this power to force those with whom it deals to make concessions in another market. In tying arrangements, a seller with economic power forces the purchaser to purchase something else to obtain the desired item. In reciprocal dealings a buyer with economic power forces a seller to buy something from it to sell its goods. In both cases the key is the extension of economic power in one market to another market. Thus,

in cases brought by parties to the agreement, the standard for judging reciprocal agreements should be no higher than the standard for judging tie-in arrangements.[5] Therefore, in this case we review the district court's action under the per se standard appropriate for tying cases.[6] The proper standard for judging reciprocal arrangements is no higher.[7]

As discussed, a tying arrangement is illegal per se whenever "a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." *Northern Pacific*, 356 U.S. at 6, 78 S.Ct. at

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[5] We intimate no view as to the proper standard in a suit brought by the government against reciprocal dealings. The government's concern in such cases is with the preclusion of other dealers from the market, not with the effects of the agreement on the parties to it. Different considerations may govern.

[6] It is also possible to base a tying suit on the general prohibitions of the Sherman Act, without relying on the per se rule. There, the plaintiff would have to embrace rule of reason evidence and arguments. *See Fortner* I, 394 U.S. at 500, 89 S.Ct. 1252, *Fortner* II, 429 U.S. at 612 n.1, 97 S.Ct. 861. The producers did not take this course.

[7] We find no reason to adopt the view expressed in *Columbia Nitrogen Corp. v. Royster Co.*, 4 Cir. 1971, 451 F.2d 3, concerning the damages available in a private reciprocity action. That decision assumed a violation of the Act was made out, then held that there were no damages. Our decision rests on the earlier question, whether there was a violation.

In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 1977, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568, the Supreme Court overruled *United States v. Arnold, Schwinn & Co.*, 1967, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249, which had imposed a per se standard of illegality on vertically imposed territorial divisions. That decision cautions us against imposing strict standards of antitrust liability in fields where the economic consequences of the arrangements are not clear. Given the limited development of the law dealing with reciprocity, this is not a case for application of a standard *stricter* than the per se standard applied to tying arrangements.

518. There is no doubt here that a substantial amount of interstate commerce is involved; the dispute centers on whether Spartan had sufficient economic power in the relevant market. In determining this, we have the benefit of a Supreme Court decision not before the district judge: *United States Steel Corp. v. Fortner Enterprises, Inc.*, 1977, 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (*Fortner II*). We discuss it at some length because we regard it as controlling the case before us.

Fortner involved the sale of prefabricated homes by United States Steel to Fortner Enterprises. A subsidiary of U.S. Steel offered 100 per cent financing to Fortner for the purchase. The financing was at a particularly low rate and on terms favorable to Fortner. The financing was available, however, only on sales of homes from U.S. Steel to Fortner. The homes themselves were more expensive than those of U.S. Steel's competitors. The relationship between Fortner and the steel company soured; Fortner brought an antitrust action, contending that the credit had beed tied to the purchase of U.S. Steel's homes, in violation of section one of the Sherman Act. A summary judgment for U.S. Steel was reversed by the Supreme Court. *Fortner Enterprises, Inc. v. United States Steel*, 1969, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (*Fortner I*). After a trial on remand, the district court directed a verdict for Fortner on the issue of liability. The Court of Appeals reversed and remanded. 6 Cir. 1971, 452 F.2d 1095, *cert. den.* 1972, 406 U.S. 919, 92 S.Ct. 1773, 32 L.Ed.2d 119. On remand the district court took additional evidence and again found that U.S. Steel was liable.[8] The Court of Appeals affirmed, 6 Cir. 1975, 523 F.2d 961. The Supreme Court reversed in a unanimous opinion.

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[8] The second trial after remand was made to the bench, because the parties waived trial by jury. The district court's conclusion came not on a directed verdict or summary judgment, but after this bench trial.

The only issue was whether Fortner had shown that U.S. Steel had economic power in the market for the tying product, credit. Four factors were advanced by Fortner to justify the lower courts' conclusion in its favor: the financial strength of U.S. Steel, the large number of similar arrangements made by U.S. Steel, the higher than market price paid for the houses, and the unique terms of the financing. 429 U.S. at 614, 97 S.Ct. 861.

The Court found the size of U.S. Steel irrelevant. It stressed that the size alone had not been shown to give the credit division any advantage in the cost of its funds or in its efficiency. The Court stressed that no cost advantage to U.S. Steel had been shown; therefore, nothing had been demonstrated about economic power. 429 U.S. at 617, 97 S.Ct. 861. The Court also found that the number of tying arrangements U.S. Steel entered did not show economic power. That factor is important only in "the absence of other explanations for the willingness of buyers to purchase the package". 429 U.S. at 618 n.10, 97 S.Ct. at 867. The non-competitive price paid by Fortner for homes was explained by the value of the entire package. "Proof that Fortner paid a higher price for the tied product is consistent with the possibility that the financing was unusually inexpensive and that the price for the entire package was equal to, or below, a competitive price." 429 U.S. at 618, 97 S.Ct. at 866 [footnote omitted].

Thus, the Supreme Court found that the questions came down to one of uniqueness:

> "The most significant finding made by the District Court related to the unique character of the credit extended to Fortner. This finding is particularly important because the unique character of the tying product has provided critical support for the finding of illegality in prior cases. Thus, the statutory grant of a patent monopoly in *International Salt v. United*

> *States*, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20, [75 U.S.P.Q. 184]; the copyright monopolies in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260, and *United States v. Loew's Inc.*, 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed.2d 11; and the extensive land holdings in *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545, represented tying products that the Court regarded as sufficiently unique to give rise to a presumption of economic power."

429 U.S. 619, 97 S.Ct. 867 [footnotes omitted]. The Court put the uniqueness question in a nutshell: "In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product". 429 U.S. at 620, 97 S.Ct. at 868. *See also Fortner I*, 394 U.S. at p. 505 & n.2, 89 S.Ct. 1252. The fact that the financing arrangement was unique "without like or equal", did not mean that the seller possessed economic power.

> "Quite clearly, if the evidence merely shows that credit terms are unique because the seller is willing to accept a lesser profit—or to incur greater risks—than its competitors, that kind of uniqueness will not give rise to any inference of economic power in the credit market . . .
>
> Without any evidence that the Credit Corp. had some cost advantage over its competitors—*or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected*—the unique character of its financing does not support the conclusion that petitioners had the kind of economic power which Fortner had the burden of proving in order to prevail in this litigation."

429 U.S. at 621-22, 97 S.Ct. at 868.

Fortner II requires that this case be reversed. The trial judge's discussion of the case shows that he was

concerned because "nobody else had that arrangement at this particular time . . . ." The arrangement, which included providing birds and buying eggs, was being "'use[d] as a lever'" according to the trial judge, quoting a Spartan internal memorandum. Citing *Northern Pacific*, he stated that "[t]he very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least, where [as] here no other explanation has been offered for . . . these restraints". The trial court concentrated on the producers' position, and concluded that they had no reason to enter a requirements contract with Spartan for their feed except their need for egg markets and flocks. The court found that Spartan's ability to deal with hatcheries in other states, an ability that the producers lacked, produced its economic power.

The court relied on two of the factors urged by Fortner, the existence of tying arrangements and the uniqueness of the package. In *Fortner II* the Supreme Court rejected the first argument because there were other explanations for the willingness of the buyers "to purchase *the package*". The trial court here pointed out that there were no other explanations for the willingness of the producers to agree to buy all their feed from Spartan, but the evidence makes clear their reason they "purchase[d] the package"—their alternative was to stop raising breeding flocks of broilers. Thus, this argument really stands with the uniqueness argument. Yet, although Spartan's program was "without like or equal" in that area of Georgia, it was not shown to be unique in the sense required in *Fortner II*. There was no evidence as to *why* Spartan was the only firm offering this package. There was no evidence that Spartan had any cost advantage over its rivals. In fact, the eventual termination of the program might support an inference that Spartan had no advantages over its rivals; instead, it may have made a mistake they avoided. Nothing pre-

sented in the district court showed that Spartan's program was "significantly differentiated from that which other [companies] could offer if they so elected . . .". In light of *Fortner II*, therefore, the requirements for finding a per se violation of the antitrust laws were not shown.

In their supplemental brief the producers argue that *Fortner II* does not damage their position. They urge that credit, the product involved in *Fortner II*, is not chickens. Credit is fungible and widely available. The producers point out again that flock placements, with guaranteed egg markets, were scarce. This argument is merely the uniqueness point in a different guise. The producers must show that Spartan had some economic advantage which enabled it to offer this arrangement when its rivals could not. The producers contend that price comparisons, easily made by Fortner, were impossible for them because the price of the feed they contracted for varied. While that may have made comparisons difficult, the producers have not shown that comparisons were impossible. All producers and consumers, and particularly farmers, operate in markets where prices may vary. The producers have already been defeated in their contention that the prices charged by Spartan were unreasonable in contravention of the Uniform Commercial Code, § 2-305(1), Ga. Code § 109A-2-305(1). *Spartan Grain & Mill Co. v. Ayers*, 5 Cir. 1975, 517 F.2d 214, 217. The producers urge that Spartan was much more sophisticated and powerful than they. The economic power *Fortner II* requires, however, must come from Spartan's relationship with its competition. If it had effective competitors in this field, economic power would not have been shown, even though *all* the companies be more sophisticated and powerful than the producers.

The producers make one other attempt to avoid the force of *Fortner II*. They urge that under section three of the Clayton Act, economic power is not required for a per se violation. The Clayton Act, passed as a response

to what Congress considered grudging constructions of the Sherman Act by the courts, specifically bans tying arrangements.

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to . . . make a sale or contract for sale of goods, . . . supplies, or other commodities . . . for use, consumption, or resale within the United States . . . on the condition, agreement or understanding that . . . [the] purchaser thereof shall not use or deal in the goods, . . . supplies, or other commodities of a competitor or competitors of the . . . seller, where the effect of such . . . sale . . . may be to substantially lessen competition . . . in any line of commerce."

15 U.S.C. § 14.

First, this section should not be applied to this case. Although we have recognized that the situation here partakes of elements of both tying arrangements and reciprocal arrangements, the true tying product was the purchase of the eggs. The producers did not contend that they could not buy flocks without egg commitments, merely that neither they nor any other producer would do such a foolish thing. The egg commitments were crucial, and such commitments are not "a sale or contract for sale of goods". Though we believe that the law of this case can best be found from the tying precedents, it does not fall within the explicit language of the Clayton Act.

Second, the producers overstate the distinction between the Clayton and Sherman Acts in this field. Although this Court has stated, in dictum, that section three of the Clayton Act does not require a showing of economic power, *Sulmeyer v. Coca Cola Co.*, 5 Cir. 1975, 515 F.2d 835, it drew that conclusion from a case from the Fourth Circuit. *Advance Business Systems & Supply Co. v. SCM Corp.*, 4 Cir. 1969, 415 F.2d 55, cert. den. 1970, 397

U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 101. In *Advance Business Systems*, however, the Fourth Circuit relied on a presumption of economic power it drew from the existence of the tying arrangements. It based that presumption on two Supreme Court cases, *Northern Pacific* and *Fortner I*. In light of *Fortner II*, that presumption is no longer strong enough to warrant the conclusion that no separate showing of economic power is necessary in the Clayton Act.[9]

The producers on this record can prevail neither under the Sherman Act nor under the Clayton Act. The question remaining is whether judgment should be entered for the defendant, as was the case in *Fortner II*, or the case be remanded for a new trial. The parties built this record on a faulty conception of the requirements for proving a per se violation. Their misconception was shared by the district court, and was reasonable in light of the earlier Supreme Court decisions in the field. No evidence was introduced to show that Spartan did *not* have the kind of cost advantage that the Supreme Court considered important in *Fortner II*. We think, therefore, that the case should be remanded for a new determination of the crucial factual question: did Spartan have economic power in this market?

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[9] In *Advance Business Systems*, the Court of Appeals for the Fourth Circuit said:

> "Congress singled out tie-ins for special treatment in the Clayton Act upon the generally accepted view that they rarely have any function other than suppression of competition. For the same reason, a seller's successful imposition of a tying arrangement on a substantial amount of commerce may be taken as proof of his economic power over the tying product. See *Fortner Enterprises* [I] . . . *Northern Pacific* . . . [citations omitted]. The Clayton Act *therefore* requires no separate showing of economic dominance where a tying arrangement affects sufficient commerce." [Emphasis added.]

415 F.2d at 62. At least one commentator has attacked use of a weaker standard under the Clayton Act. *See* L. Sullivan, Antitrust 440-41 (1977).

III

Our resolution of the substantive antitrust issues in this case disposes of several other appealed questions.[10] Four issues remain.

First, the producers contend that the judge erred in refusing to permit them to introduce evidence dealing with the quality of Spartan's feed. They maintain that Spartan's feed became less nutritious at one point. Thus, their damages from being required to buy Spartan feed should have included not only the price difference, but a sum for the lower quality of the chicken feed. The trial court refused to allow expert testimony on the quality, apparently in response to Spartan's argument that this issue had been resolved in the trial of the contract claims. Rec., Vol. VII, 142-52. The trial court in the first case did direct a verdict against the producers on the feed question. The producers did not appeal. Al-

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[10] The question whether the district court erred procedurally by granting a directed verdict at the close of *plaintiffs'* evidence is now moot. So is the question whether the district court abused its discretion in the award of attorneys' fees. The prevailing party in this litigation is once again in question. The evidentiary issue concerning Spartan's practices in other areas should be reconsidered by the trial court in light of the larger inquiry into Spartan's market position required on remand.

Two final issues Spartan raises must be rejected. (a) The district court did not err by failing to find, as a matter of law, that the producers had no damages. We view this question as dependent, of course, on the liability question. If liability had been properly established, damages could have been recovered. The amount of those damages was properly submitted to the jury. (b) Nor did the district court err in rejecting Spartan's res judicata argument. Spartan urges that because, in the contract action, the lower court and this Court agreed that the price of its feed was not unreasonable under U.C.C. standards, it could not have been a violation of the antitrust laws. Spartan has cited no authority for the proposition that commercially reasonable prices cannot still be higher than those which could have been obtained absent an antitrust violation. The argument is meritless.

though the question is now one of antitrust damages, the issue is the same. The producers cannot raise it again.

Second, the producers charge the trial court erred by allowing Spartan interest on the contract judgment from the date of entry of the district court judgment. The producers appealed the district court's directed verdicts against their counterclaims to this Court, won reversal on several of their claims, and then settled those issues with Spartan. The producers advance two reasons why interest should run from a later date: the reversals meant that no final judgment had been entered below, and the long delay, against the producers' wishes, in trying the antitrust case made it unfair to charge them with interest from before the conclusion of that case. The producers won reversals in the contracts case on several counterclaims; they never appealed the directed verdict granted Spartan on its accounts. As to that money, the judgment of the district court was not just affirmed, which under Rule 37 of the Federal Rules of Appellate Procedure would make interest run from the date of the district court judgment. The judgment was never questioned. The separate issues of the counterclaims should not disturb that unappealed ruling. Fairness does not require a different result. The contract claims were on the producers' accounts with Spartan. They complain that the interest run up over the past years amounts to a formidable sum. So does the sum representing the returns Spartan might have made had the producers paid their accounts when due. The producers have had the use of these funds since the district court's first judgment; it is not unfair that interest should run against them from that time.

Third, the producers appeal from the district court's ruling that their Truth-in-Lending Act claim was time-barred. Their counterclaim involved interest rate disclosures. The last purchase of feed any producer made from Spartan was in July 1972. The counterclaim was asserted in March 1974. The Truth-in-Lending Act has

a one year statute of limitation. 15 U.S.C. § 1640(e). The producers also maintain, however, that their counterclaim be treated in the alternative as an equitable recoupment, which admittedly is not subject to a statute of limitations.

We think that the district court properly found the Truth-in-Lending counterclaim time-barred. Whether or not it properly applied *Goldman v. First National Bank*, 1975, N.D.Ill., 392 F.Supp. 214, in finding that the statute ran from the time the purchase contracts were made, the claims would still be barred. Spartan's complaint was filed within one year of the last purchases. The producers assert that the complaint tolled the statute of limitations on all compulsory counterclaims, citing *De Vito v. Hoffman*, 1952, 91 U.S.App.D.C. 263, 199 F.2d 468. That proposition has not been entirely accepted. *See* Wright & Miller, Federal Practice and Procedure, §§ 1409, 1419. The producers assumed too easily, however, that a Truth-in-Lending counterclaim to a suit on an account is a compulsory counterclaim. While we have found no precedent directly on point, two district courts have decided the converse question: That actions for money owed are permissive counterclaims to the Truth-in-Lending Act suits. *Zelter v. Carte Blanche Corp.*, 1976, W.D.Pa., 414 F.Supp. 1221, *Roberts v. National School of Radio & Television Broadcasting*, 1974, N.D. Ga., 374 F.Supp. 1266, 1270-71. In that situation a conclusion that the counterclaim was compulsory would have required a federal court to take jurisdiction over state law matters; here, the counterclaim involves the federal statute. Although that distinction would make compulsory status more likely, we feel this counterclaim is still better considered permissive. Although it arises from the contract transaction, the Truth-in-Lending Act claim involves entirely separate questions of law and fact from those dealing with the producers' liability on their accounts. Therefore, the statute of limitations was not tolled by the filing of the complaint even if the filing

would toll the statute for a compulsory counterclaim. Thus, whether the statute began to run when the contract was made, as the district court held, or when the transactions were consummated, this counterclaim was time-barred.

The producers' recoupment claim remains. As they point out, recoupment has been recognized as an equitable defense, not controlled by statutes of limitations. The record does not show why the district court rejected the producers' request for recoupment. The judge did hold that the producers' usury claims had been abandoned. Whether this included the recoupment claim or not is unclear. The record dealing with the interest question is limited: we have not been able to discover whether recoupment was raised below. The producers' recoupment argument appears at least substantial. On remand, if the district court concludes that the issue was presented to it originally, it should deal with the issue. If the issue was abandoned, of course, the district court need not give the producers another chance.

IV.

Integration of the broiler chicken industry continues to provide difficult questions for appellate courts. *See National Broiler Marketing Ass'n v. United States*, 1978, —— U.S. ——, 98 S.Ct. 2122, 56 L.Ed.2d 728 (Capper-Volstead antitrust exemption for farmers' cooperatives does not apply to N.B.M.A.); *Bayside Enterprises, Inc. v. N.L.R.B.*, 1977, 429 U.S. 298, 97 S.Ct. 576, 50 L.Ed.2d 494 (truck drivers transporting feed for a vertically integrated poultry firm are not agricultural laborers, exempt from the N.L.R.A.). Spartan's efforts toward contractual vertical integration present questions in the area between tying arrangements and reciprocal dealings, in a time when antitrust law in that field is undergoing a change in emphasis. As a result, we must reverse and remand for a new trial. The judgment of the district court is AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8003

D.C. Docket No. CIV-828-ATH

SPARTAN GRAIN & MILL COMPANY,
Plaintiff-Appellant,
Cross-Appellee,

versus

VIRGIL AYERS, W. C. MEADERS, JR.,
BOYCE BLACKMON & JOE ACKER,
Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court
for the Middle District of Georgia

Before GODBOLD, Chief Judge, RONEY and KRAVITCH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED;

It is further ordered that defendants-appellees/cross-appellants pay to plaintiff-appellant/cross-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 5, 1984

For the Court: Spencer D. Mercer
Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

Issued as Mandate: Aug. 21, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8003

SPARTAN GRAIN & MILL COMPANY,
Plaintiff-Appellant,
Cross-Appellee,

versus

VIRGIL AYERS, W. C. MEADERS,
BOYCE BLACKMON & JOE ACKER,
Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion July 5, 1984, 11 Cir., 1984, 2 F.2d ——).

(August 9, 1984)

Before GODBOLD, Chief Judge, RONEY and KRAVITCH, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

84-712

Supreme Court, U.S.
FILED
NOV 29 1984
ALEXANDER L. STEVAS
CLERK

In The Supreme Court
Of The United States

OCTOBER TERM 1984

No.

VIRGIL AYERS, W.C. MEADERS, JR.,
BOYCE BLACKMON and JOE ACKER,

Petitioners,

v.

SPARTAN GRAIN & MILL COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Do *Fortner II*, *Spartan I*, and *Spartan II*, demand the holding that Spartan's program did not constitute an illegal tie-in, since there was no evidence that Spartan had a cost advantage in offering its program?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No.

VIRGIL AYERS, W.C. MEADERS, JR.,
BOYCE BLACKMON and JOE ACKER,

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals is Spartan Grain & Mill Co., v. Ayers et. al., 735 F.2d 1284 (11th Cir. 1984), (Spartan II) and is reprinted in

the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The Petition accurately states the jurisdiction of the Court.

QUESTION PRESENTED

Do Fortner II, Spartan I, and Spartan II, demand the holding that Spartan's program did not constitute an illegal tie-in, since there was no evidence that Spartan had a cost advantage in offering its program?

STATEMENT OF THE CASE

The Supreme Court denied certiorari in this case once before. See, Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419

(5th Cir. 1978), cert. denied, 444 U.S. 831 (1979) (Spartan I). Judge Wisdom's decision in Spartan I, sets out the background history of the poultry industry, and states the factual setting of this case.

Briefly, as was mentioned in Spartan I, there are several distinct steps in the production of broiler chickens. Following World War II, the companies in the industry moved toward the consolidation of these steps of production under one roof. As a result of this integration of the industry, independent segments of the industry which did not consolidate, like Spartan, a feed company, had no markets for their product. Similarly, the

independent farmer lost a market in which to sell his hatching eggs.

In the late 1960's Spartan established a program which gave Spartan a market for its feed and at the same time provided the farmer a market for his hatching eggs. Spartan negotiated with broiler hatcheries in Pennsylvania and Ohio for commitments to buy hatching eggs, and also arranged with primary breeders to produce flocks of laying chicks. This enabled Spartan to offer a program to the farmer-producer whereby Spartan would purchase the eggs from the producer's flock and the producer would feed Spartan feed to his birds.

The producers entered numerous

contracts with Spartan on a yearly basis from the late 1960's until 1971 and 1972 when Spartan phased out its program. In November, 1972 Spartan filed suit in federal court against producers Ayers, Blackman, and Meadors for unpaid balances of their feed accounts, and the producers filed an antitrust counterclaim. Together with Mr. Acker, who filed his antitrust suit in August, 1973, the producers challenged Spartan's program as a per se illegal tying arrangement and a per se illegal reciprocal dealing arrangement in violation of section 1 of the Sherman Act, 15 U.S.C. §1.

The trial court directed a verdict against Spartan at the close of the

producers' evidence, holding that the program was a per se violation of section 1 of the Sherman Act. On appeal to the United States Court of Appeals for the Fifth Circuit, Judge Wisdom reversed and remanded the case under United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977) (Fortner II). Applying the Fortner II standard, Judge Wisdom emphasized that on remand the producers must prove that Spartan had economic power in the market of the tying product in the form of a cost advantage over its competitors. This was the very test articulated by the Supreme Court in Fortner II.

During the retrial following the remand Spartan introduced substantial evidence that Spartan did not have a cost advantage over its competitors, and many competitors testified that they could have easily offered a program like Spartan's program had they desired to do so. With respect to whether Spartan had the cost advantage over its competitors as required by Fortner II and Spartan I, the jury was asked the following question as a second special interrogatory:

> Was Spartan Grain & Mill Company in the Royston area able to offer a guaranteed price for hatching eggs during the life of the flock at a time when its competitors under conditions then existing could not have offered an equivalent guaranteed price if they had elected to do so?

The jury answered "no" to this question and, based upon this answer, the Eleventh Circuit Court of Appeals reversed the trial court's judgment and directed that judgment be entered in favor of Spartan. Spartan Grain & Mill Co. v. Ayers, et. al., 735 F.2d 1284 (11th Cir. 1984) (Spartan II). The Eleventh Circuit held that it was error for the trial court to give the first special interrogatory to the jury, that the jury's answer to the second question conclusively showed that Spartan did not have a cost advantage over its competitors, and that judgment should have been entered in favor of Spartan. Specifically, in Spartan II

Judge Roney, speaking for the panel of Judges Godbold, Kovitch and Roney, stated:

> In the instant case, Spartan tied the purchase of grain to a guaranteed market for eggs. Fortner II dictates that the issue on which Spartan's antitrust liability turns is whether Spartan had a cost advantage in the tying product market. Since Spartan's tying product was a guaranteed market for eggs, the key factual inquiry should have been directed at Spartan's economic ability vis-a-vis its competitors to provide a market for eggs.
>
> When the special interrogatories are examined in light of this analysis, the first must be rejected as irrelevant to the question of economic advantage. The first interrogatory asked whether Spartan's arrangement with the eastern hatcheries to purchase broiler eggs was an economic advantage. In phrasing the interrogatory in that manner, the district court focused attention

on the economic advantage of the tying product instead of on Spartan's economic advantage in securing the tying product. The Supreme Court cautioned against exactly this mistep in Fortner II: economic power when measured strictly by economic advantage is "somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it." Fortner II, 429 U.S. at 621, 97 S.Ct. at 868. The district court's entry of judgment on the basis of the answer to the first interrogatory was error.

The question remains whether a third trial is appropriate. The answer in favor of Spartan on the second interrogatory is conclusive on the issue of economic power. Judgment should be entered for Spartan. (emphasis added).

735 F.2d at 1288-89.

REASONS FOR DENYING THE WRIT

I.

BOTH SPARTAN I AND SPARTAN II EXACTLY APPLY THE PRINCIPLES SET OUT BY THE SUPREME COURT IN FORTNER II.

In applying Fortner II to this case, Judge Wisdom, in Spartan I, stated:

> Without any evidence that the Credit Corp had some cost advantage over its competitors-or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected-the unique character of its financing does not support the conclusion that petitioners had the kind of economic power which Fortner had the burden of proving in order to prevail in this litigation." 429 U.S. at 621-22, 97 S.Ct. at 868.
>
> . . .
>
> Yet, although Spartan's program was "without like or

> equal" in that area of Georgia, it was not shown to be unique in the sense required in Fortner II. There was no evidence that Spartan had any cost advantage over its rivals. In fact, the eventual termination of the program might support an inference that Spartan had no advantages over its rivals; instead, it may have made a mistake they avoided.

581 F.2d at 427.

In Spartan II the Eleventh Circuit correctly held that, since the jury answered the second special interrogatory regarding cost advantage in Spartan's favor, it was conclusive that Spartan did not have the requisite cost advantage over its competitors.

II.

THE SUPREME COURT'S OPINION IN JEFFERSON PARISH DOES NOT CONTRADICT OR OVERRULE ITS OPINION IN FORTNER II.

Consistent with his opinion in Fortner II, Justice Stevens in Jefferson Parish Hospital District No. 2 v. Hyde, ___U.S.___, 104 S.Ct. 1551 at 1561 (1984), pointed out that the strict per se rule can be applied to tie-in arrangements when "the seller offers a unique product that competitors are not able to offer:" The question resolved in Fortner II, as was resolved in Spartan I and Spartan II, was that the defendants did not have a cost advantage over their competitors, that the competitors had

the ability to offer similar products had they chosen to do so, and that the programs, therefore, were not unique. In Jefferson Parish, Justice Stevens went on to point out that, when uniqueness is not at issue, a way to determine market power may be to evaluate the defendant's percentage of the market in comparison to the market percentage of others in the market who actually provide similar products or services. A finding that the defendant has a large percentage of the market may indicate that the defendant has market power.

It would be impossible, however, to apply a Jefferson Parish market percentage analysis to a Fortner II or

Spartan II situation where the Court has already determined that there are many competitors with the potential to offer the same program, but who do not actually offer it. There was no need to consider market percentages in Spartan II or in Fortner II, since there were numerous competitors, and the only real issue was whether the defendant's program was unique in that the defendants had a "cost advantage" over competitors.

CONCLUSION

In both Spartan I and Spartan II the Court of Appeals correctly applied the guidelines of Fortner II in disposing of the producers' antitrust claims, and

the Supreme Court's opinion in Jefferson Parish, does not contradict or overrule its opinion in Fortner II. Accordingly, Spartan respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 84-712

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

VIRGIA AYERS, W. C. MEADERS, JR., BOYCE BLACKMON AND JOE ACKER,

Petitioners,

v.

SPARTAN GRAIN & MILL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

The jury found that other firms could have offered an independent program for the production of hatching eggs "if they had elected to do so". From an accounting standpoint, a Ralston Purina can offer any program it elects, particularly if it is willing to lose money.

The testimony was replete, however, that by offering an independent program, Spartan's competitors would have sacrificed certain efficiencies of integration. They did not offer an independent program, therefore, because "it was not econmically attractive." Spartan Grain & Mill Co. v. Ayers, 735 F.2d 1284, 1287 (11th Cir. 1984) (emphasis supplied). As Spartan's economic expert testified, integrated firms "wouldn't have touched that kind of a program at all."

Accordingly, whether others could have offered an independent program "if they had elected to do so" is irrelevant for two reasons. First, proof of economic power does not require proof of insurmountable barriers to entry. To establish that no competitor could have offered an independent program would have been to

establish Spartan's absolute monopoly power, a standard of proof which tie-in cases do not require. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502-04 (1969).

Second, the question fails to distinguish between accounting costs and economic costs. From an accounting standpoint, Ralston Purina's great size may or may not afford it market power. From an economic standpoint, the "economic advantage" which the jury found that Spartan enjoyed "over its competitors" clearly did afford it market power.

Otherwise, Spartan would have been unable "to raise price significantly above the competitive level . . . ." Graphic Products Distributors v. Itek Corp., 717 F.2d 1560, 1570 (11th Cir. 1983). Spartan would have been unable to use its tie-in

"to facilitate price discrimination. ..." United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 617 (1977). Spartan would have been unable to "force" burdensome terms on producers. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, _____ U.S. _____ , 104 S.Ct. 1551, 1558-59 (1984). Spartan would have been unable "to induce [its] customers for one product to buy a second product from [it] that would not otherwise have been purchased solely on the merit of the second product." Id, 104 S.Ct. at 1559 n. 20.

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